

In the
United States Court of Appeal
For the Ninth Circuit

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN;
JUDA GLASNER and OSHER ZILBERSTEIN
doing business as the UNITED ORTHODOX
RABBINATE of GREATER LOS ANGELES,
UNITED ORTHODOX RABBINATE of
GREATER LOS ANGELES, A. M. BAUMAN
and JACOB ADLER,

Appellees.

Appellant's Closing Brief

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Appellees.

No. 22480

Appellant's Closing Brief

PRELIMINARY STATEMENT

Juda Glasner is the only defendant who has submitted an appellee's brief. This defendant asks affirmance of the judgment on the two grounds stated by the trial court:

1. That the injured party is the corporation, not plaintiff.

2. That the defendant, Juda Glasner, as an employee of the State of California, is immune from prosecution under the Civil Rights Act.

Appellee Glasner adds a third ground for affirming the judgment:

3. That this Court should accept as true and correct the contentions of fact advanced by the defendant Glasner in support of his motion for summary judgment, and reject those facts of the plaintiff submitted in opposition thereto.

It is respectfully submitted that all of the above contentions are contrary to established law.

POINT I

THE INJURED PARTY IN THIS CAUSE IS THE PLAINTIFF, DAVID ERlich, AN INDIVIDUAL, AND NOT THE WEST COAST POULTRY COMPANY, A CALIFORNIA CORPORATION.

That plaintiff, David Erlich, an individual, is the injured party in this cause is fully explored in Point IV of Appellant's Opening Brief. Appellee counters with an excellent dissertation that the law does not permit a corporation to maintain an action for injuries for violation under the Civil Rights Act and even includes in his discussion the elements required to maintain a derivative action under Sec. 834 of the California Corporations Code. (Appellee's Brief, page 12) and then on page 13 states:

“Appellant's suit is not a derivative suit on behalf of the corporation although the damages claimed are for interference with the corporation's business.”

This statement, of course, is not entirely correct, for appellant in his opening brief specifically details the injuries done directly to him by the defendants. These are set forth in the overt acts alleged in Paragraph VIII of the amended complaint (Tr. pp. 4-5). Since allegations of the complaint are presumed true on a motion to dismiss (*Cooper v. Pate*, (1964) 378 U.S. 546, 84 S. Ct. 1733), and since the facts alleged in the amended complaint are neither denied nor discussed in Glasner's affidavit in support of his motion for summary judgment (Tr. pp. 45-49), a statement as to the law, even though correct, is meaningless.

Appellant in his Opening Brief emphasized the fact that the defendant Glasner in depriving him of his civil rights under the color of state law attacked him directly, and also indirectly through the close family type corporation. As to that portion of the amended complaint where it is alleged that the defendant, Glasner, used his office as Kosher Food Law Inspector to attack the plaintiff directly, the elements of a cause of action under the Civil Rights Act are sufficiently stated. A question does exist, however, whether the injuries to plaintiff through the corporation are sufficient and are adequate to withstand a motion to dismiss for failure to state a claim.

In this connection it seems to be the position of the appellee that although an individual may have sustained harm through a corporation, the cause of action always remains in the corporation and never in the

individual and refuses to discuss the fact that a situation may exist where defendant's tort may damage the individual directly even though the harm is done through a corporation.

If the injury was done to a public corporation with many shareholders, the cause of action would presumably lie only with the corporation. But West Coast Poultry is a small corporation, where all of the stock is owned by the plaintiff and his wife and they are also the sole officers and directors. Moreover, this organization is identified with the public as the plaintiff. In such an event, where the individual and the corporation are considered by the public as one, the tortious conduct of the defendant damages both at the same time and not separately and independently.

Whether these conditions do or do not exist would seem to be a question of fact to be determined by a trier of fact, under the peculiar circumstances of the case, and not as a solid question of law. That is the real meaning of *Sutter v. General Petroleum Corp.* (1946), 28 C. 2d 525, 170 P. 2d 898, cited in Appellant's Opening Brief, and what the Supreme Court of the State of California meant when it said on page 530:

“But ‘if the injury is one to the plaintiff as a stockholder and to him individually and not to the corporation, as where the action is based on a contract to which he is a party, or in a right belonging severally to him, or on a fraud affecting him directly, it is an individual action . . .’”

It is not the unsupported statement of the appellee that whenever a corporation is involved, regardless of the fact that a stockholder as an individual is also directly injured, the cause of action must always remain with the corporation and never with the individual.

In *Toboni v. Pennington Millinery Co.* (1959), 172 C.A. 2d 47, 341 P. 2d 845, which defendant relies upon on page 13 of his brief the court found that the:

“ . . . gravamen of her complaint is a wrong done to the corporation, a mulcting of its assets, a misappropriation of its business and properties by two of its directors, aided and assisted by Tom Cooney and the Tom Cooney Company, a business competitor of the Pennington Company. Plaintiff has merely a stockholder’s interest in the allegedly mismanaged mismanagement and mulcted corporation. (*Tobini v. Pennington Millinery Co.* on page 50.) ”

This of course, made the situation a derivative action and since there was no direct injury to the plaintiff, *Sutter v. General Petroleum Corporation* was not involved.

On page 16 of his brief, appellee in referring to the complaint of appellant that the criminal charges for violation of California Penal Code Sec. 383b was filed directly against him rather than the corporation, states:

“Certainly, Civil Rights legislation does not give any citizen the right to be immune from criminal charges being filed against him. The mere

filing of such charges could not possibly have deprived appellant of any civil rights. Appellant's pleading does not allege whether he alternately was found guilty or not of the charges. If found guilty he was not deprived of any civil rights. (He does not claim that he was abused or mishandled, physically or mentally, or was deprived of counsel, etc. by appellee Glasner or any other official or any of the defendants.) If found guilty, he was not deprived of any civil right for he violated Sec. 383b, California Penal Code, in such event. His allegation that two criminal charges were filed against him does not allege any violation of any of his civil rights."

Since Glasner was the complaining witness in both cases, and actively participated in both trials, both as a witness and as an investigating officer sitting at the counsel table with the prosecuting attorney, it is interesting to note that appellee does not state that at the conclusion of the first trial the jury brought in a verdict of not guilty, and that at the second trial the charges were dismissed upon the prosecutor's opening statement. Moreover appellee ignores the force of appellant's argument; why if the corporation was the offender, charges of violating Sec. 383b was brought only against Erlich and not against the corporation (App. Op. Br. pp. 33, 36).

The fact still remains that Erlich as an individual, was the deliberate, intended victim of the acts of Glasner, and this is further borne out by the fact that al-

though criminal complaints were also filed against employees Abramovitz, Glickman, Orlanski and Friedman, never once was a criminal complaint for violating Sec. 383b ever filed against the corporation whom the appellee now insists was always the real and true offender.

It is respectfully submitted that there are sufficient facts in the record to indicate that the conduct of the defendants injured the plaintiff directly, and not the corporation, and since this cause was decided on a motion for summary judgment, these facts should be determined by a trier of fact rather than on affidavits.

POINT II

REGARDING THE IMMUNITY OF APPELLEE GLASNER, THE CALIFORNIA STATE KOSHER FOOD LAW REPRESENTATIVE.

Appellee premises this argument with the statement that if there is any basis for sustaining the trial court's ruling, it should and must be affirmed (Appellee's Brief, p. 19).

Appellant differs. The statement would be correct if the appeal was from a judgment rendered after a trial on the merits. It is not applicable on a review from a judgment granting a motion for summary judgment, where the only question involved is whether an issue of fact exists, not the correctness of the facts (*Byrnes*

v. Mutual Life Insurance Company of New York, (9th Cir., 1964), 217 F. 2d 497; cert den. 348 U.S. 971, 75 S. Ct. 532).

Moreover, the record on appeal from a summary judgment is reviewed by an appellate court in the light most favorable to the appellant.

Poller v. Columbia Broadcasting System, (1962) 386 U.S. 464, 473; 82 S. Ct. 486, 491.

Carr v. City of Anchorage, 9th Cir., 1957, 243 F. 2d 482, 483.

Despite the fact that the courts have uniformly held since the decision of *Monroe v. Pape* in 1961 (365 U.S. 167; 81 S. Ct. 473; 5 L. Ed. 2d 492) that public officials (judges, prosecutors and legislators excepted) have no immunity under state law in an action brought under the Civil Rights Act, appellee insists that such immunity bars the present law suit as a matter of law and in support thereof cites either decisions that were decided prior to *Monroe v. Pape* or cases that do not involve the Civil Rights Act.

Barr v. Matteo (1959) 360 U.S. 564; 79 S. Ct. 1335, 3 L. Ed. 2d 1434, (Appellee's Brief, pp. 22 et seq.) was an action for damages for libel based on an alleged unauthorized press release. Moreover, defendant was a federal employee and not subject to an action under the Civil Rights Act. Violation of Civil Rights Act is applicable only to deprivation of rights when defend-

ant is acting under color of *state* law, not Federal law. (*Norton v. McShane* (5th Cir., 1964) 332 F. 2d 855, 862.)

S & S Logging Co. v. Barker (9th Cir., 1966) 366 F. 2d 617 was mentioned in Appellant's Opening Brief (Appellant's Opening Brief, p. 14) is not an action brought under the Civil Rights law, and although mentioned as an authority by appellees on pages 24-25 of his brief, the distinction is ignored.

Norton v. McShane (5th Cir., 1964) 332 F. 2d 855, mentioned on pages 24 and 25 of appellee's brief, also involved an employee of the federal government, which by the nature of their employment were immune from actions under the Civil Rights Act. This distinction mentioned on pages 14-15 of Appellant's Opening Brief is also ignored by Appellee.

On page 24 appellee refers to the case of *Garrison v. State of Louisiana* (1964) 379 U.S. 64; 85 S. Ct. 209, 13 L. Ed. 2d 125 which also did not involve a Civil Rights action. This was a criminal case where the defendant was convicted of criminal defamation and reversed on the grounds that the Louisiana criminal libel statute incorporated constitutionally invalid standards in context of criticism of official conduct of public officials in violation of the first amendment guaranteeing free speech.

On page 26 appellee makes an interesting distinction. He states:

“Appellant cites and relies upon *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed. 2d 492, *Pierson v. Ray*, 1967, 386 U.S. 547, 87 St.Ct. 1213, 18 L.Ed. 2d 288 and *Cohen v. Norris*, 9th Cir., 1962, 300 F. 2d 24, each of which concerned activity of policemen. Appellee Glasner, contrary to appellant’s thesis, is not and never was a policeman; he was the duly appointed, qualified and acting Kosher Food Law Representative of the California Department of Public Health; . . .”

and further emphasises the fact that in these three cases police brutality was involved, which is not the present situation.

Although appellee refers to “policemen,” presumably he intends to encompass all law enforcement officers and not limit his analogy to only those employed by a city. In this connection it is respectfully submitted that appellee Glasner’s position was that of a law enforcement officer (California Health and Safety Code Sec. 214; *Glasner v. Dept. of Public Health*, 1967, 253 A.C.A. 813, 814-815; 61 Cal. Rptr. 415).

In any event, and without belaboring the point, the distinction is not applicable because the Civil Rights Act, (42 U.S.C.A. 1983 et seq.) is applicable to all state employees and immunity for liability thereunder is available only to prosecutors, members of the legislature, and members of the judiciary.

Although appellee has referred this court to many cases which hold that immunity is a perfect defense in

actions brought against public officials, not one of them involved a proceeding under the Civil Rights Act against a state official, and not one of those cases referred to by appellee involving civil rights held that a state official is immune from liability under the Civil Rights Act for conduct falling within the discretionary duties of his employment. The only such expression is contained in the opinion of the trial court in the present cause.

Although immunity from liability under the Civil Rights Act is still no defense in an action for violation under the Civil Rights Act, all is not lost to the civil service employee, for the Supreme Court in *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S. Ct. 1213; 18 L.Ed. 2d 288 held that the defense of good faith and probable cause is available to a defendant in an action under sec. 1983.

Moreover, whether what the defendant Glasner did and the circumstances under which he did them were actually discretionary as contended by appellee, or not as contended by appellant (Appellant's Opening Brief, Point II, pages 16-18), are issues of fact which should be determined by a trier of fact.

POINT III

REGARDING THE SUFFICIENCY OF GLASNER'S AFFIDAVIT.

Appellee's position seems to be in his Point III that this court should accept as correct Glasner's version of what transpired and accordingly affirm the judgment. That, however, is not the function of a summary judgment, for in a motion for summary judgment the court may not weigh facts. The purpose of a summary judgment is to determine whether a triable issue of fact exists, not to determine the facts, and the burden is on the moving party to show that no genuine issue of material facts exists. These are basic principles in all motions for summary judgment.

Appellee's position is strange. He states:

"It must be remembered that the motions were predicated not only on the affidavits but also upon the records and files of the cause which latter furnished many of the facts upon which judgment of dismissal and summary judgment properly was had." (Appellee's Brief, page 30.)

If this is so, then obviously the judgment must be reversed, for the judgment of dismissal could only be based upon the fact that the amended complaint failed to state facts sufficient upon which to predicate a claim and summary judgment only upon the affidavit in support of the motion indicating that no issue exists. If the court actually considered records and files there is no

way of knowing the basis of the court's decision, or what the court relied upon to reach its conclusion. Appellant is of the opinion, however, that the reason for the court's decision is fully contained in its opinion (Transcript, pp. 106-112; *Erlich v. Glasner*, 274 F. Supp. 12.) which also contains the statement:

“Since this opinion sets forth the basis for the court's ruling, no finding of fact and conclusions of law shall be required.” (Tr. p. 112.)

In this connection it should be specifically noted that the trial court did not discuss the affidavits of either the plaintiff or the defendants, and specifically confined its ruling to two points:

1. The real party in interest is the corporation and not the plaintiff (Paragraph 2).

2. That because of the discretionary nature of his duties the defendant Glasner was immune from prosecution under the Civil Rights Act.

However, certain statements by appellee regarding the affidavits require answers. On page 32 appellee in referring to his affidavit states:

“He [Glasner] never caused or attempted to cause criminal prosecution of anyone by reason of the specific identity of the Rabbi or Rabbis whose services were being used.”

This, of course, is in direct contradiction to the criminal complaint filed by Glasner on May 20, 1965

charging Rabbi Orlanski and Rabbi Friedman, the supervising Rabbis of the plaintiff with violating sec. 383b of the Penal Code of the State of California (Tr. p. 78). Although mentioned by Erlich in his affidavit (R. T. p. 57) it is ignored by appellee, who takes the position that this court should and must adopt appellee's statements to the contrary. And what is equally interesting is that immediately following the hearing of this matter, Rabbis Orlanski and Friedman joined the United Orthodox Rabbinate of Greater Los Angeles and plaintiff lost their services as supervising Rabbis. (Tr. p. 57.)

On page 33 appellee states:

“There is no showing as to whether the corporation ever was or was not also criminally prosecuted.”

It is respectfully submitted that appellee is evading the situation. Certainly Glasner as the sole enforcement officer for the Department of Health would know whether the corporation ever was or was not criminally prosecuted, and the answer is that it wasn't. Assuredly if it had been, it would have been mentioned in Glasner's affidavit or at least in his brief.

On page 34 appellee for the first time raises the question that some of the exhibits may be hearsay or hearsay on hearsay. No such objection was raised in the court below, and if it had been, the originals would have been produced. Where no objection is made that

statements contained in documents are hearsay, the contents may be considered by the court. (*Continental Oil Co. v. United States*, 9th Cir., 1950, 184 F. 2d 802, 813.) Of course, if Rabbi Glasner differs with Mr. Goth as to what transpired, that question should be determined by a trier of fact and the court not accept Glasner's version as to what actually happened.

On page 37 appellee states:

“Appellant makes the statement that the court, not the ecclesiastical body, is the forum to determine the ecclesiastical question of whether the schoichet is or is not complying with Hebrew religious laws in slaughtering and processing Kosher (or claimed Kosher) meats.”

But appellant makes no such claim. What appellant does claim and contend is that the United Orthodox Rabbinate, in which Glasner is an active member, decided by itself it would be the sole body to determine what is and what is not Kosher, and extend their influence to every Jew regardless of whether they were a member of this organization or not. And if the law permits Rabbis to perform marriages which will be recognized by the civil government, as appellee correctly states on page 37, appellee should have carried his example a bit further and explained the validity of a marriage performed by a Rabbi who is not a member of the United Orthodox Rabbinate and is not recognized as a Rabbi by this organization.

On page 38 appellee refers to the testimony of

“ . . . Salter and Reyna, former employees of plaintiff [who] were offered payment to falsely testify that plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements.”

Appellee then goes on to argue that since Glasner in his affidavit expressly disavowed his participation therein, the court should accept his statement as true, particularly since no affidavit of either of these persons were produced by appellant.

Erich in his affidavit states:

“ . . . and that the defendants in this cause and the other persons involved refused to give affidavits stating the facts. These facts will have to be obtained by way of discovery proceedings.”
(Tr. p. 52.)

Rule 56(e) of the Rules of Civil Procedure regarding summary judgment states in part:

“The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.”

Upon the argument of the motion for summary judgment it was suggested to the court by counsel for the plaintiff that ruling thereon be deferred until after discovery proceedings were had to establish these facts.

The request was denied and in view of the fact that the court rested its decision on two legal principles, the refusal to permit discovery proceedings is understandable.

The false testimony from Salter and Reyna was obtained by Etner who turned it over to Glasner with an explanation as to how he obtained it, and Glasner thereupon took these statements to the District Attorney (Tr. p. 59). As a conspirator Glasner was equally liable with Etner. Whether Glasner discussed Salter and Reyna with Etner before Etner visited them is something discovery proceedings will reveal. But there is no doubt Glasner accepted this information and promptly acted on it.

POINT IV

SUMMARY

1. The facts in this case clearly indicate that the arrows of the defendants were directed at the plaintiff; that it was the plaintiff who was injured directly by the shafts and not the corporation, and that he is the real party in interest.

2. That although the defendant Glasner had discretionary acts in the performance of his duties, what he did was not within that discretion.

3. In any event immunity, even immunity for discretionary acts, is not a defense in an action under the Civil Rights Act.

POINT V
CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment in favor of the defendants should be reversed.

Respectfully submitted,

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and

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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